Case Number:	Criminal Appeal 127 of 2014
Date Delivered:	07 Dec 2018
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Agnes Kalekye Murgor, Kathurima M'inoti
Citation:	Ayub Ombaka Masime v Republic [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	CR.A No. 76 of 2007
Case Outcome:	-
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM): MUSINGA, M'INOTI & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 127 OF 2014

BETWEEN

AYUB OMBAKA MASIME.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu, J.W. Mwera & J. R.Karanja, JJ) dated 4th August, 2009

in

H.C.CR.A No. 76 of 2007)

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JUDGMENT OF THE COURT

Ayub Ombaka Masime, the appellant, was charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence were that on the 11th October 2006 at about 10.45pm at the Nyalenda "B" Sub Location in Kisumu District of the former Nyanza Province, the appellant, jointly with others not before the court, robbed Zakaria Maope Nyambasi of his identity card, one biro pen and Kshs. 150, all valued at Kshs 160, and immediately before or immediately after the robbery he used actual violence on ***Zakaria Maope Nyambasi (Maope), PWI.***

The trial magistrate convicted and sentenced the appellant to death as prescribed by law upon finding that the offence of robbery with violence was proved beyond reasonable doubt. The appellant was dissatisfied with the decision, and appealed to the High Court (Mwera and Karanja, JJ), which upheld the conviction and sentence of the trial court.

The appellant now prefers an appeal to this Court on the grounds that the learned judges erred in law in reaching a finding that was against the weight of the evidence that the appellant was in recent possession of the stolen goods, and in failing to reevaluate the evidence that was before the trial court.

In the submissions on behalf of the appellant, learned counsel, ***Mr. O. Okoyo*** contended that the High Court found that there was no proper identification of the appellant, but relied on the doctrine of recent possession to convict the appellant, on the basis that he was found in possession of the complainant's money and a biro pen. Counsel further submitted that the appellant had testified that he was on his way home when he met some police officers who stopped him and searched his pockets; that they demanded that Maope give them a pen with which to write the serial number of the Kshs 100/- note recovered from the appellant.

Counsel also contended that with regard to the money, the High Court did not evaluate the evidence to ascertain the time it would have taken to transfer or pass on the Kshs. 50 which was not recovered from him. It was counsel's case that the court ought not to have convicted the appellant on the basis of Kshs. 100 since the alleged robbery was in respect of Kshs. 150. Finally counsel urged us to review the sentence, should we uphold the conviction, in the view of the decision of the Supreme Court in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015***.

Mr. Ketoo, learned counsel for the State conceded the appeal, and reiterated that the conviction was based on the doctrine of recent possession, but submitted that the only money found in the appellant's possession was Kshs. 100 and not Kshs. 150 as specified in the charge sheet. With respect to the pen, counsel further submitted that though the police officer had testified that the pen was in the appellant's pocket, the appellant had denied that it was recovered from him. Further, it was posited that though Maope had testified that the appellant was with 4 other people, there was no evidence pointing to the participation of the other attackers or that the missing Kshs. 50 was taken by one of them.

The jurisdiction of this Court, it is clearly defined as determining only questions of law on second appeals. See ***Joseph Njoroge vs Republic [1982] KLR 388.***

We have considered the grounds of appeal and the parties' submissions and are of the view that the issue for determination is, whether the appellant was found in recent possession of Kshs. 150 and the biro pen that were stolen from the complainant.

At this juncture a brief outline of the facts is essential. At about 10.45pm on 11th October 2006, after a brief stop for two beers at Yanga Bar, Maope, an employee of Telkom Kenya, requested the bar's watchman to escort him to his house which was about 200 metres away. After they walked for a few minutes, four young men who were walking very fast overtook them. They then turned and confronted Maope and the watchman and demanded Maope's mobile phone. As he did not have one, the attackers emptied his pockets, while two of them restrained the watchman. They robbed him of Kshs. 150, a biro pen with the name Oketcha C.O., one of Maope's colleagues at work, written on a piece of paper inside the pen's tube, and a copy of an identity card.

According to Maope, the robbers carried on walking in the same direction, but soon thereafter they turned around and ran back towards them, as police officers on patrol in the area were chasing after them. One of them, the appellant herein, was apprehended by the police officers. Maope reported the incident, and identified the appellant, as one of the persons who had just robbed him. The appellant was searched, and the biro pen and Kshs. 100 were found in his possession. ***Jason Odhiambo, PW2,*** who was with Maope at the time of the robbery, repeated the evidence as narrated by Maope. He too had identified the appellant.

PC Fredrick Muindi ,PW3, and his colleagues were on patrol in the area on the night in question when he saw a group of four young men walking towards them. When they ordered them to stop, they ran off in different directions, but the police officers managed to arrest the appellant. It was while they were questioning him that Maope arrived at the scene and reported that he was robbed of Kshs. 150, a biro pen and a copy of an identity card by the appellant whom they identified. When they searched him, they found a pen which Maope identified as one of the items that was stolen from him.

The pen belonged to ***Charles Otieno Okecha, PW4,*** Maope's colleague who had lent it to him in the office, but Maope had not returned it; that the next day Maope had informed him that the pen had been stolen during a robbery whilst he was on his way home.

In his defence, the appellant testified that he was walking along the road, when he saw people running away from police officers who were chasing them. They arrested him and when Maope arrived at the scene, he identified him as the one of the people who had robbed him. The appellant admitted that he was searched, and Kshs. 100 note which Maope had removed from his (the appellant's) pocket was recovered from him; that the police officers had requested Maope for a pen to record the serial number of the Kshs. 100 note, and he was surprised when the pen was produced as an exhibit yet it was not recovered from him. He also claimed that the Kshs. 100 belonged to him.

Relying on the factors outlined in ***Republic vs Turnbull (1976) 3 All ER 549***, the High Court found that the conditions at the scene of the offence were not conducive for identification of the appellant, and concluded that he appellant was not properly identified. The court however found that the appellant was circumstantially linked to the offence through the doctrine of recent possession, and hinged the appellant's conviction on this evidence.

On the finding on the doctrine of recent possession, the learned judges had this to say;

"The learned magistrate did not believe the appellant's explanation of his possession of the stolen items immediately after the offence. The learned trial magistrate opined that the explanation was an afterthought.

We share the opinion with the learned trail magistrate and add that the explanation was so improbable as to be the truth. The appellant was arrested "red-handed" and found with items stolen from the complainant a few minutes or seconds ago. As it were

the appellant was in most recent possession of stolen goods. The evidence in support of the fact was not at all or significantly discredited."

In the case of ***Isaac Nanga Kahiga alias Peter Nganga Kahiga v/s Republic, Criminal Appeal No. 272 of 2005*** (unreported), the Court delivered itself in these terms:

"....It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be proved. In other words, there must be positive proof first, that the property was found with the suspect, and secondly that, the property is positively identified as the property of the complainant, thirdly that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses ....."

In the case of ***Hassan vs Republic (2005) 2 KLR 11***, the court stated that;

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver".

The appellant's case is that he was not found in recent possession of Kshs. 150 and that the biro pen was borrowed by the police officers from Maope to write the serial number of the Kshs. 100 note that was never recovered from him.

When the principles for establishing the doctrine of recent possession are applied to the circumstances of this case, beginning with recovery of Kshs. 100 instead of Kshs. 150, the questions that come to the fore are whether the amount of Kshs. 150 belonged to Maope or to the appellant, and if so, whether the missing Kshs. 50 was easily transferable.

Maope stated that the appellant and three other attackers emptied his pockets and stole his money which was in denominations of Kshs. 100 and Kshs. 50. Jakson Odhiambo, the watchman, confirmed that they were attacked, and Maope's money stolen from him. When the appellant was arrested by PC Muindi, only Kshs 100 was recovered from his pocket which money the appellant claimed belonged to him, and not to Maope.

Despite his explanation, there is nothing either in the cross examination of the prosecution witnesses or in his defence that explained how he came to be in possession of Kshs. 100. Like the trial court and the High Court, we are satisfied that this explanation was an afterthought.

As to the ease of transfer of the missing Kshs. 50, given that the money was in two different denominations, and it was not controverted that that the appellant was accompanied by other robbers, and given the circumstances, it would be a plausible enough explanation that Kshs. 50 could easily have been transferred from the appellant to one of the other attackers, and why it was not recovered in his possession.

Turning to the biro pen, Maope stated that he borrowed it from Okecha C.O, one of his workmates, which is how it came to be in his pocket. Inside the tube of the pen was a piece of paper with the name Okecha C. O written on it. Okecha C.O identified the pen as one he had lent to Maobe who had yet to return it to him. It is this pen that was found in the appellant's possession following the robbery. PC Muindi stated that he recovered the pen from one of the appellant's pockets.

Despite the appellant's defence that one of the police officers requested Maope for a pen so as to write down the serial number of the Kshs. 100 note, this explanation was not put to the prosecution witnesses at any time during the trial. In addition, no other explanation was offered as to how a pen belonging to Okecha C. O was found in his possession.

Without such explanation, we are satisfied that the appellant was found most recently in possession of Maope's money and pen, and failed to explain how they came to be in his possession. Further, we find that this evidence pointed to the appellant as being one of the robbers who attacked Maope on the night in question.

Following conviction for the offence, the appellant was sentenced to death. And since the delivery of the judgment of the High

Court, in the case of ***Francis Karioko Muruatetu & Another v. Republic*** ***(Supra)*** the Supreme Court has found that the mandatory death sentence prescribed for the offence of murder by ***section 204*** of the ***Penal Code*** is unconstitutional. The Court explained itself thus;

"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

Though the ***Muruatetu case (supra)*** was concerned with the interpretation and application of ***section 204*** of the ***Penal Code*** on the offence of murder, we consider that the Supreme Court's reasoning may be interpreted and applied in much the same way to the mandatory death sentence specified by ***section 296(2)*** of the ***Penal Code*** for robbery with violence.

The appellant was a first offender, and craved for a non custodial sentence during mitigation. He was armed not, but sought to momentarily strangle the complainant in order to rob him. The complainant was not treated for any significant injury, and the items stolen from him were Kshs. 150 and a biro pen.

Whilst sentencing him, the trial magistrate observed that the offence for which he was found guilty did not permit the court any discretionary latitude, and consequently he was sentenced to death. In these circumstances, we are satisfied that the death sentence imposed on the appellant is disproportionate to the circumstances surrounding the offence. The appellant has been incarcerated since 16th October 2006, a period of about twelve years.

In sum, the appellant's appeal against conviction hereby fails and is dismissed in its entirety. As regards sentence, we hereby allow the appeal, set aside the sentence of death imposed on the appellant and substitute therefor a sentence of 15 years, with effect from 16th October, 2006.

It is so ordered.

Dated and delivered at Kisumu this 7th day of December, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR